JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 331

AARON L. SIMON,

Petitioner,

against

MAURICE WEINGOLD, Public Administrator, as Administrator of the Goods, Chattels and Credits of MARTIN VAN WYCK, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review three orders of the United States Court of Appeals for the Second Circuit, as follows: (a) Order dated and entered April 10, 1967, which denied appellant's motion for an extension of time in which to docket his appeal; (b) Order dated and entered April 10, 1967, which granted appellee's motion to dismiss the appeal; and (c) Order dated and entered June 12, 1967, which denied appellant's motion to reinstate his appeal.

Opinions Below

No opinions were written by the Court of Appeals in determining said motions.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Did the Court of Appeals abuse its discretion, or did it actually decline to exercise any judicial discretion, in making its determination that no substantial question for appeal existed in the case?

2. Did the Court of Appeals apply the procedures provided for in Rule 73 of the Federal Rules of Civil Procedure and in Rule 14 (c) of the Rules of the Court of Appeals for the Second Circuit?

3. Did the several determinations of the Court of Appeals deny due process of law to the appellant?

4. Did said determinations deny equal protection of the laws to the appellant?

5. Did the appeal present a substantial question; and did the Court of Appeals commit error in failing to discern that a substantial question was indeed presented?

6. Are the several determinations of the Court of Appeals in conflict with decisions of the Supreme Court,

the Courts of Appeals of other Circuits, and prior decisions of the Court of Appeals of the Second Circuit?

7. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings so as to call upon the Supreme Court for the exercise of its power of supervision?

Statutes Involved

Rule 73 of the Federal Rules of Civil Procedure, Title 28 U. S. C.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of judgment appealed from • • •

• • •

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

• • •

(g) Docketing the Appeal; Filing of the Record on Appeal. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the court of appeals and the appeal to be docketed there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein

provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States. When more than one appeal is taken from the same judgment to the same court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

Rules of the Court of Appeals for the Second Circuit, 28 U. S. C.

14. Docketing cases—(a) Time within which record must be filed. In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing (Rule 73 (g) of the Federal Rules of Civil

Procedure (c. 15 of this volume)). In an appeal in a criminal case the appellant shall docket the case and file the record within the time fixed by Rule 39 of the Federal Rules of Criminal Procedure (c. 2 of this volume). If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29 (9).

(b) Motion to file record. This court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits, or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) Dismissal by the clerk. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall

be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

Statement of the Case

On January 19, 1967, appellant filed a notice of appeal from a judgment entered on December 21, 1966, in the United States District Court for the Eastern District of New York. Said judgment dismissed the complaint based on personal injuries received in an automobile accident, following a trial without a jury. Pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, the appeal should have been docketed within 40 days, that is on or before February 28, 1967. Appellant failed to docket the appeal within the prescribed time.

On March 28, 1967, appellant moved in the Court of Appeals for the Second Circuit for an order which would extend his time for docketing until April 19, 1967, a date just 90 days after filing the notice of appeal. On April 3, 1967, the appellee moved for an order which would dismiss the appeal on the ground that he had not been served with a proposed case. Appellee's motion was in violation of Rule 14 (c) of the Rules of the Court of Appeals for two reasons:

(a) Whereas said Rule directs that a motion to dismiss for failure to docket shall be made before the Clerk, appellant addressed his motion to the Court; and

(b) Said Rule provides that when the appellee dockets the appeal, "it shall stand for argument". Prior to the return day of the two motions, appellee docketed the appeal and paid the required filing fee. The effect of such docket-

ing, implicit in the Court's Rule, was to cure appellant's delay in docketing the appeal.

Appellant's motion for a time extension and appellee's motion to dismiss were both argued on April 10, 1967. Appellant's motion was denied and the appeal was dismissed in two orders dated April 10, 1967. In reporting the Court's decision from the bench, the Chief Judge stated that the rulings were made because the appeal lacked merit. Presumably the excuse presented for the delay in docketing was deemed sufficient.

In respect of such delay, the appellant's motion showed the following facts. The notice of appeal had been served on January 19, 1967, by Seymour C. Hartman, Esq., the attorney who tried the case. However, it was not until February 21, 1967, that Irving L. Weinberger, Esq., was retained to conduct the appeal. Soon thereafter the court reporter was contacted, but he required an advance payment before proceeding to transcribe his minutes. Counsel wrote to the appellant and asked him to send his check to the reporter. Unfortunately the appellant, Dr. Simon, was away in Puerto Rico and delay ensued in his making the requested payment. On March 17, 1967, the appellant mailed his check to the reporter. The reporter, then informed counsel that the minutes would be ready on approximately April 15, 1967. On March 23, 1967, counsel prepared the Record in the District Court and the Clerk promptly transmitted same, less the minutes, to the Court of Appeals. On March 28, 1967, the appellant moved in the Court of Appeals for an extension of time to docket the complete Record.

In respect of the merits of the appeal and the substantial question involved, the moving affidavit stated the following:

> "The principal issue in the appeal is that the cross-examination of the plaintiff on collateral is-

sues went far beyond the proper scope so as to deny the plaintiff a fair trial".

In the course of the argument, appellant's counsel informed the Court that the cross-examination related to appellant's conviction of a crime thirty years before the accident.

On April 18, 1967, appellant applied for reconsideration to the Court which had heard the argument. The supporting affidavit provided more elaborate detail in respect of the merits of the appeal and the substantiality of the question. Said motion for reconsideration was denied in an order dated and entered on April 20, 1967.

On April 24, 1967, appellant applied for reconsideration to the Court en banc. Appellant contended that the determination of the motions was at variance with the Court's liberal policy of relieving an appellant of default where the neglect is excusable and the appeal contains a substantial question. Said application was denied in an order dated and entered on May 9, 1967.

On May 29, 1967, appellant moved for an order, pursuant to Rule 14 (c) of the Rules of the Court of Appeals for the Second Circuit, which would reinstate the appeal. Said motion was denied in an order dated and entered June 12, 1967. In respect of excusable neglect, the moving affidavit repeated the reasons for delay substantially as related above, with the following additions:

> "I made the decision to defer the motion for an enlargement of time for docketing until I would be able to show the Court that the appeal was being prosecuted actively."

And:

> "Even if the appeal had been docketed within the prescribed time, it could not have been processed so

as to be heard before the summer recess. Accordingly, no possible prejudice could result to the appellee".

In respect of the substantiality of the question, the moving affidavit made a more complete showing of the facts than had been presented in the original motion for a time extension. It was pointed out that the appellant, Dr. Simon, is now an elderly practicing physician in New Jersey. Many years ago, after having become a doctor, the appellant switched to the legal profession and achieved success at the negligence bar. Suddenly his legal career terminated in a judgment of conviction based upon impropriety with a jury, followed by imprisonment and disbarment.

Approximately thirty years thereafter, on March 30, 1963, Dr. Simon was injured in an automobile accident. He then instituted the instant lawsuit for personal injuries. Following a trial without a jury his complaint was dismissed on the ground of contributory negligence. Appellant claimed that error was committed on the trial because of the unwarranted cross-examination of the appellant in respect of his criminal conduct, which subjected him to humiliation and degradation, and which deprived him of a fair trial.

Defendant was permitted to inquire not only about the conviction, but also about the punishment; and also about additional criminal conduct at an earlier date, in respect of which there was no conviction. The plaintiff's rights as a human being were debased, whether or not there was a jury present. Moreover, the result reached by the trial judge establishes that he rejected the plaintiff's testimony on the sole ground that he was unworthy of belief.

Dr. Simon's version of the accident was that there was a car ahead of him stopped for a red light at the intersection.

He slowed down and came to a full stop behind said car. A minute later, the defendant's car hit him in the rear and propelled him into the car in front. Defendant contended that there was no car ahead; but that at a distance of some 75 feet before the intersection, the plaintiff was distracted by some article on the front seat and bent over to pick it up. Then, without signal or warning, the plaintiff forcefully applied his brakes and came to a sudden stop. The driver of the defendant's car then applied his brakes and skidded into the plaintiff's car.

Having adopted the theory that there never was any car stopped at the intersection in front of the plaintiff's vehicle, defendant presumed that he would have little difficulty in proving it. After all, the only evidence of the presence of a car ahead would have to come from the plaintiff. Thereupon the defendant's objective became the destruction of the plaintiff as a witness and a man, so that nothing the plaintiff had to say in connection with the accident would be worthy of belief.

The trial court found that plaintiff's car had not been propelled into another vehicle. Said finding was made in spite of the fact that plaintiff's version of the accident was sustained by the highest quality of professional testimony. An eminent medical specialist testified, without contradiction, that the only manner in which the physical injury could have occurred was by a sudden propulsion forward, followed by an instantaneous stopping upon impact against the car ahead. Ironically enough, the trial judge stated that he accepted the plaintiff's medical proof.

Defendant's counsel was forthright in his announcement to the Court that the defense would be a personal attack upon the plaintiff. He stated:

> "In other words, the diagnosis made, the claim as to what occurred, when it occurred, and how it

occurred, and what were the results are based primarily upon this witness' credibility".

Thus, the presence or absence of an automobile ahead would be proved by criminal acts which had occurred thirty years earlier. In developing such proof, defendant was not satisfied to establish the conviction alone. That was only the starting point in his cross-examination.

Said cross-examination violated the rule that for impeachment purposes it is improper to show accusation, arrest or indictment (*Hockaday* v. *Red Line, Inc.* (D. C. Cir., 1949, 174 F. 2d 154, 155)). The cross-examination in the instant case shows the following:

"Q. How about back in the 1920's were you convicted of a crime? A. 1920? Yes. That's an examination that I made, and they said that examination was—another insurance company that did it——

Q. Well, were you convicted of a crime? A. I was acquitted. I was never convicted. I was acquitted. It was set aside".

Going back to the '20's was no mere error. Defendant knew that if there had been a conviction in the '20's, plaintiff would not have been trying cases as a lawyer in the '30's.

In *Hockaday* v. *Red Line, Inc.* (*supra*, 174 F. 2d 154) the defendant brought out that the plaintiff in a negligence action had been convicted of a crime. But the defendant did not stop there. He showed that the plaintiff had received a suspended sentence which was revoked because he failed to enter military service. The Court directed a reversal on the authority of *Lee Kwong Nom* v. *United States* (Sec. Cir., 1927, 20 F. 2d 470) where the Court stated:

"The length of his imprisonment was immaterial; he was sufficiently impeached, and his credibility attacked, by the question and answer which brought forth the admission of his conviction".

In violation of said rule, the cross-examination in the instant case developed the following:

"Q. Did you receive a sentence? A. Yes. Oh, yes.

Q. Did you serve a sentence? A. Certainly.

Q. You served a sentence. A. Despite the fact the medical board said they ignored it.

Q. Where were you confined, Doctor? A. In State Prison in Trenton.

Q. And that was on—for how long a period were you confined? A. Three years, one on each".

Each of three crimes charged in the indictments was described in detail. The indictments themselves were received in evidence. This was permitted even though the plaintiff had never denied such conviction.

In determining unsubstantiality the Court of Appeals laid great emphasis on the fact that the case was tried by a court only. It is manifest, however, that the finding of the trial judge reflected a rejection of the plaintiff's testimony and medical evidence, based ostensibly on the factor of credibility.

The rules of evidence which exclude the cross-examination which was conducted in this case, were not intended to apply only in a case tried before a jury. The prejudicial matter which was received in the trial of this case did not become admissible because no jury was present. III Wigmore on Evidence Sec. 983, p. 551, points out that there are two reasons which underlie the exclusionary

rule. The first is plain decency and the second is public policy. Thus (p. 551):

> "The second reason is a politic one, i.e. that with the prospect of such an examination as a possibility, the public is certain to dread the witness box. From time to time those whose knowledge would have been valuable will seek to evade disclosing it; the ascertainment of the truth will be hampered and perhaps prevented. That such a feeling exists in a greater or less degree, can hardly be doubted".

See also: Renzo D. Bowers "The Judicial Discretion of Trial Courts", p. 487; *Third Great Western Turnpike Co.* v. *Loomis,* 332 N. Y. 127; *State* v. *Hull,* 52 W. Va. 296, 43 S. E. 160.

Reasons for Granting the Writ

There are important reasons why the Writ of Certiorari should be granted in this case:

1. The several determinations of the Court of Appeals have denied the appellant due process of law. The Court initially granted a motion to dismiss which had been brought on in violation of the Court's Rule 14. Said Rule also gave to the appellant an absolute right to move for reinstatement of his appeal following dismissal. On such motion, the appellant had the right to be heard. The determination of the motion to reinstate, when measured against the presentation of fact and law submitted in support of said motion, compels the conclusion that the Court of Appeals gave no judicial consideration to the motion and made no legal evaluation of the substantiality of the question presented therein. The proper exercise of judicial discretion required the Court to hear said motion and not to deny it out of hand. The obligation to accord said

motion a proper hearing was mandated both by Rule 73 F. R. C. P. and Rule 14 of the Court's own Rules. Moreover, the Court should have acknowledged the irregularity of the prior proceedings in the matter; and, out of concern for the integrity of its own orders, should have addressed itself to correct same.

2. The several determinations of the Court of Appeals have also denied the appellant equal protection of the laws. If an appeal possessing inherit merit can be dismissed, and remain dismissed, only because of a short delay in docketing, which has been sufficiently explained, then the rule for timely docketing is converted by judicial fiat into a jurisdictional requirement. Said determinations offend against the provision in Rule 73 (a) F. R. C. P. that the failure to perfect the appeal expeditiously does not affect the validity of the appeal. It has been held that such delay is not jurisdictional (*Phillips* v. *Employers' Mutual Liability Insurance Co. of Wisconsin*, Fifth Cir., 1956, 239 F. 2d 79; Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 1559, p. 90). If a proper judicial discretion is in fact exercised in determining whether an appeal should be dismissed under Rule 73, it may be presumed that the meritorious causes will be permitted to proceed and that those lacking in substance will be doomed. However, if no discretion is exercised, or if it is abused, then an appellant's rights are left to pure chance and the judicial process becomes unequal and discriminatory.

3. The Court of Appeals erred in determining that the appeal lacked substance. Appellant raised the issue of whether the plaintiff had received a fair trial when he was subjected to a merciless cross-examination in respect of a conviction which occurred thirty years before the accident, an examination which was permitted to proceed beyond

all proper limits as defined by the authorities, and which clearly influenced the trial court's determination on the facts and the law. If this had been a criminal case, the Court of Appeals, in conformity with the recent rulings of the Supreme Court, would have immediately perceived that the issue called for judicial review. It is submitted that litigants in a civil action are also entitled to a fair trial and to judicial review of a judgment which emanates from a prejudicial trial.

4. The several determinations of the Court of Appeals are in conflict with the decision of the Supreme Court in *Pyramid Freight Corporation* v. *Ispass,* 330 U. S. 695, 67 S. Ct. 954. While this Court there affirmed the action of the Court of Appeals as authorized under Rule 73 F. R. C. P., it also pointed out that the procedure was in conformity with the Rule of the Court of Appeals.

5. The several determinations of the Court of Appeals are in conflict with determinations reached by the Courts of other Circuits (*Mikhelson* v. *Yonng Men's Christian Association,* Sev. Cir., 1963, 317 F. 2d 78; *Phillips* v. *Employers' Mutual Liability Ins. Co. of Wisconsin,* Fifth Cir., 1956, 239 F. 2d 79; *Perry* v. *United States,* Ninth Cir., 1955, 225 F. 2d 724; *Stumpf* v. *Matthews,* D. C. Cir., 1951, 195 F. 2d 25; *Mutual Benefit Health & Accident Assn.* v. *Snyder,* Sixth Cir., 1940, 109 F. 2d 469.

6. The several determinations of the Court of Appeals are in conflict with said Court's prior decisions. In *Mosier* v. *Federal Reserve Bank of New York,* 1942, 132 F. 2d 710, the appellant failed to docket his Record for three years following filing of the notice of appeal. While remarking that such delay was extraordinary and unexplained, the Court denied a motion to dismiss and heard

the appeal on the merits. In *Pyramid Motor Freight Corporation* v. *Ispass,* 1945, 152 F. 2d 619, mod. 330 U. S. 695, where the appellant delayed four months before applying for a time extension, the Court stated:

> "In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment."

7. The several determinations of the Court of Appeals represent a deviation from a previously established policy of liberality in the granting of time extensions so that a meritorious appeal might proceed despite delay. Practitioners at the New York bar have proceeded in reliance upon such liberal policy, which now has ostensibly been abandoned. In all fairness to the attorneys who practice in said Court, the Court of Appeals should have announced its new policy either by writing an appropriate decision or by amending Rule 14. A majority of said practitioners also conduct appeals in the Appellate Division, First Department, of the New York Supreme Court. In 1964, the Appellate Division served notice upon the bar that it would employ a sterner rule where there was delay in perfecting an appeal (*Tonkonogy* v. *Jaffin,* 21 A. D. 2d 264, 249 N. Y. S. 2d 934). Even despite said warning, appeals in said court are rarely dismissed unconditionally; an appellant is granted an opportunity to perfect his appeal on or before a fixed date. The practitioners at the federal bar are continuing under a misapprehension that an equivalent liberal policy still prevails in the Second Circuit. Changing the rules, without providing due notice, constitutes unfairness and a violation of due process.

8. This is not just another accident case. The plaintiff here has been denied his right to an appeal which called for a review of questions that fundamentally affect the right of a litigant to a fair trial. The Court of Appeals either failed to apprehend that such questions existed in the case, or, what is more probable, failed to give any judicial consideration to appellant's demonstration thereof. The dismissal of this appeal concerns not only the plaintiff in the instant case, but all litigants who may be denied substantial rights by a process that is arbitrary and capricious, rather than an administration of due process of law. It is submitted that the circumstances call upon the Supreme Court to exercise its power of supervision to the end that justice may be effected in the instant case and in the many cases that will be heard in the Second Circuit.

It is therefore respectfully urged that the orders of the United States Court of Appeals for the Second Circuit should be reversed, and to that end the Writ prayed for herein should issue.

Respectfully submitted,

IRVING L. WEINBERGER,
Attorney for Petitioner.

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Of Counsel.

FILED
AUG 3 1967
JOHN F. DAVIS, CLERK

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully prays that the petition for a writ of certiorari to review three orders of the United States Court of Appeals for the Second Circuit be denied.

Opinions Below

1. Order of the United States Court of Appeals for the Second Circuit dated and entered April 10, 1967, which unanimously denied appellant's motion for an extension of time in which to docket his appeal.

2. Order of the United States Court of Appeals for the Second Circuit dated and entered April 10, 1967, which unanimously granted appellee's motion to dismiss the appeal.

3. Order of the United States Court of Appeals for the Second Circuit dated and entered April 20, 1967, which unanimously denied appellant's motion to reconsider dismissal of his appeal.

4. Order of the United States Court of Appeals for the Second Circuit dated and entered May 9, 1967, denying appellant's petition for rehearing *in banc*: "No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard *in banc*, the same stands denied."

5. Order of the United States Court of Appeals for the Second Circuit dated and entered on June 12, 1967, which unanimously denied appellant's motion to reinstate his appeal.

Jurisdiction

It is the position of the respondent that the petitioner has failed to demonstrate that the United States Supreme Court should invoke its jurisdiction under Title 28, U.S.C. 1254 (1) to review the foregoing orders numbered 1, 2, and 5, of the United States Court of Appeals for the Second Circuit.

Questions Presented

1. Has the petitioner demonstrated that it is important for the United States Supreme Court to invoke its jurisdiction to review the dismissal by the United States Court of Appeals for the Second Circuit of an appeal from a judgment in a negligence action in which the United States District Court, Eastern District of New York, found that the plaintiff's own negligence contributed to the accident upon which suit was brought and directed entry of judgment in favor of defendant after trial without jury?

2. Has the petitioner demonstrated that the United States Court of Appeals for the Second Circuit abused the discretion conferred upon it by Rule 73 of the Federal Rules of Civil Proccedure, Title 28 U.S.C., and Section 2071, Title 28 U.S.C. in dismissing the petitioner's appeal for failure to file the record and docket his appeal as required by both Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28, U.S.C.?

Statutes Involved

Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from . . .

. . .

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

. . .

(g) Docketing the Appeal; Filing of the Record on Appeal. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the court of appeals and the appeal to be docket there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein

provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States. When more than one appeal is taken from the same judgment to the same court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period, but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

Rules of the Court of Appeals for the Second Circuit, 28 U.S.C.

14. Docketing cases—(a) Time within which record must be filed. In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing (Rule 73 (g) of the Federal Rules of Civil Procedure). In an appeal in a criminal case the appellant shall docket the case and file the record within the time

fixed by Rule 39 of the Federal Rules of Criminal Procedure. If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29 (9).

(b). Motion to file record. This court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) Dismissal by the clerk. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

Section 2071, Title 28 U.S.C.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the

conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, Section 102, 63 Stat. 104.

Section 4513 of the Civil Practice Law and Rules of New York State, Laws 1962, Chap. 308

"4513. Competency of person convicted of crime.

A person who has been convicted of a crime is a competent witness; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer."

Statement of the Case

This suit was based on an automobile accident that occurred in June of 1961. The petitioner who was the operator of one of the vehicles involved in the accident commenced suit alleging that the negligence of the defendant's intestate caused the accident. The suit was tried during December of 1966 before the United States District Court, Eastern District of New York, without a jury. That the petitioner had been convicted of a crime was brought out on direct examination by the petitioner's attorney. On cross examination when the petitioner's testimony was vague and indefinite as to the nature of what crimes he had been convicted, the date of such convictions, and the sentences given, certified copies of the convictions were placed in evidence. During the course of the trial, nine witnesses testified and some fifteen exhibits were placed in evidence. After having due deliberation thereon, the trial court found on December 20, 1966, that the negligence of

the petitioner contributed to the accident upon which suit was brought and directed the entry of judgment in favor of the defendant and ordered that the complaint be dismissed. Judgment for the defendant was entered and filed on December 21, 1966.

A notice of appeal dated January 19, 1967, was filed by the petitioner. On April 10, 1967, this matter came before the United States Court of Appeals for the Second Circuit on motion of the petitioner for an extension of time to perfect his appeal and upon the motion of the respondent to dismiss the said appeal for failure to prosecute the appeal as required by the terms of Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C. During the course of the arguments on behalf of the respective parties, the United States Court of Appeals for the Second Circuit, Chief Judge Lombard presiding, gave the petitioner's counsel ample opportunity both prior and subsequent to the argument of the counsel for the respondent to demonstrate whether the failure of the petitioner to comply with the foregoing Rules was beyond the control of the petitioner or due to justifiable excuse and whether there was a substantial question presented to make the appeal meritorious. When neither the moving papers nor the oral arguments on behalf of the petitioner set forth facts to establish either that the delay was beyond the control of the petitioner or that there was a substantial question presented to make the appeal meritorious, the United States Court of Appeals for the Second Circuit by orders dated and entered April 10, 1967, unanimously denied petitioner's motion for an extension of time in which to docket his appeal and unanimously granted respondent's motion to dismiss the petitioner's appeal.

On April 18, 1967, the petitioner filed an application to have the United States Court of Appeals for the Second Circuit to reconsider the dismissal of his appeal. By

order dated and entered April 20, 1967, the United States Court of Appeals for the Second Circuit unanimously denied the petitioner's motion to reconsider the dismissal of his appeal.

On April 26, 1967, the petitioner filed a petition to the United States Court of Appeals for the Second Circuit to have the case reheard *in banc.* By order dated and entered May 9, 1967, the United States Court of Appeals for the Second Circuit, by its Chief Judge ruled "No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard *in banc,* the same stands denied".

On May 29, 1967, the petitioner moved to "reinstate the appeal, heretofore dismissed" and the United States Court of Appeals for the Second Circuit unanimously denied the petitioner's motion by order dated and entered on June 12, 1967.

On July 5, 1967, the petitioner served a "Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit". This brief is submitted in opposition to that petition.

POINT I

The petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review the dismissal by the United States Court of Appeals for the Second Circuit of an appeal from a judgment in a negligence action in which the United States District Court, Eastern District of New York, found that the plaintiff's own negligence contributed to the accident upon which suit was brought and directed entry of judgment in favor of the defendant after trial without a jury.

1. The dismissal of the petitioner's appeal by the United States Court of Appeals for the Second Circuit after he

failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., is not in conflict with the decision of the Supreme Court of the United States in *Pyramid Freight Corporation* v. *Ispass*, 330 U. S. 695, 67 S. Ct. 954 The latter decision is the only decision of the United States Supreme Court cited by the petitioner as being in conflict with the dismissal of his appeal by the United States Court of Appeals for the Second Circuit. Far from there being any conflict, the decision of the Supreme Court in the *Pyramid* case recognized that the United States Court of Appeals for the Second Circuit was specifically empowered by Rule 73, Title 28 U.S.C. to take "such action as the court of appeals deems appropriate, which may include dismissal of the appeal". The United States Supreme Court in that case not only recognized the discretion vested by the said Rule in the United States Court of Appeals for the Second Circuit but refused to interfere with the discretion exercised. In its opinion, the United States Supreme Court, said at page 702:

> "The authority of a Judge of the Circuit Court of Appeals for the Second Circuit to extend the time for filing the record on appeal appears to be supported by Rule 15 of that court. That Rule, however, was not discussed by counsel and we sustain the action taken by the Circuit Court of Appeals under authority of Rule 73(a), even without reference to its own Rule 15. . . ."
>
> "We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration under Rule 73(a) in connection with all the other circumstances before it. Rule 73(a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no reason to question the discretion exer-

cised in this case as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented."

In the case at bar, discretion to dismiss the petitioner's appeal was expressly conferred by Rule 73a of the Federal Rules of Civil Procedure, Title 28 U.S.C. and by Rule 14 of the Rules of the Court of Appeals for the Second Circuit, 28 U.S.C Similarly, after four applications to the United States Court of Appeals for the Second Circuit, no active circuit judge requested a vote be taken on the petitioner's suggestion that the case be reheard *in banc* and each of the petitioner's repeated applications were unanimously denied

2. The dismissal of the petitioner's appeal by the United States Court of Appeals for the Second Circuit after the petitioner failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., is not in conflict with the discretion recognized and applied in the decisions of the various United States Courts of Appeals. The published decisions of the United States Courts of Appeals in which leave to file records or otherwise perfect appeals has been denied and appeals dismissed where the appellants' excuses have been deemed insufficient are very numerous indeed. Among the many such decisions of the various United States Courts of Appeals which are consistent with the action taken in the instant case by the United States Court of Appeals for the Second Circuit are the following cases: *MacNeil Bros. Co.* v. *Forte* (CA 1st), 253 F2nd 500; *Galvin* v. *National Biscuit Co.* (CA 2nd), 177 F2nd 963; *Wendel* v. *Hoffman* (CA 3rd), 104 F2nd 57; *Morrow* v. *Wood* (CA 5th), 126 F2nd 1021; *Lamb* v. *Shasta Oil Co.* (CA 5th), 149 F2nd 729; *Copco Steel & Engineering Co.* v. *Neunkircher Eisenwerk* (CA 6th), 267 F2nd 491; *Mulvaney* v. *Lever Bros. Co.* (CA 6th), 158 F2nd 956; *United States* v. *Schlolfeldt* (CA 7th), 123 F2nd 109;

Plankington Bldg. Co. v. *First Mortgage Bondholders Protective Committee* (CA 7th), 133 F2nd 900; *Gammill* v. *Federal Land Bank of St. Louis* (CA 7th), 129 F2nd 501; *Tucker Products Corporation* v. *Helms* (CA 9th), 171 F2nd 126 certiorari denied 336 US 938 69 S Ct 748; *Spears* v. *Shell Oil Co.* (CA 9th), 249 F2nd 396; *Markham* v. *Kallimanis* (CA 9th), 151 F2nd 145 certiorari denied 327 US 788 S Ct 806; *United States* v. *Krause* (CA 9th), 197 F2nd 329; *United States* v. *Tamotsu Fujisaki* (CA 9th), 198 F2nd 747; *Beecher* v. *Smithson* (CA 9th), 205 F2nd 113; *Baccolla* v. *United States* (CA 5th), 199 F2nd 954; *Brennan* v. *Rock Wool Insulating Co.* (CA 10th), 337 F2nd 849; *Maghan* v. *Young* (CA DC), 154 F2nd 13; *Citizens Protective League Inc.* v. *Clark* (CA DC), 178 F2nd 703; *United States* v. *Bowen* (CA 5th), 310 F2d 45.

3. Dismissal of the petitioners' appeal by the United States Court of Appeals for the Second Circuit after the petitioner had failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., did not deny the petitioner of equal protection of the laws, nor of due process of law. In the "Petition for Writ of Certiorari", it is admitted on page 6 that the petitioner "failed to docket the appeal within the prescribed time". The time is prescribed by Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. The said Rule 73 also authorized the United States Court of Appeals to take such action "which may include dismissal of the appeal", for failure to perfect the appeal in accordance with the Rule. No claim has been supported nor has any authority been cited that the said Rule 73 denies an appellant of due process of law or equal protection of the law. Similarly, Section 2071 of Title 28 U.S.C. empowers the United States Courts to prescribe rules for the conduct of their business. Rule 14 of the Rules of the United States Court of Appeals for the Second Circuit Title 28 U.S.C. provides that where an

appellant has failed to docket the action and file the record in the time prescribed, "this Court will not hear and grant motions for filing and docketing appeals . . . except upon a showing by affidavit or otherwise as the court may order (1) that the delay has been due to causes beyond the control of the moving party or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal. . . ." The power of the United States Courts under the foregoing Rules and under Section 2071 of Title 28 U.S.C. to prescribe and enforce rules in the conduct of their business cannot be seriously questioned.

Where an appellant fails to comply with the requirements of the foregoing Rules, he cannot be heard to contend that he has been deprived of equal protection of the laws or of due process of law. That is particularly true in the instant case where the petitioner has failed in his repeated applications to the United States Court of Appeals to establish either that his failure to comply with the foregoing Rules was due to causes beyond his control or was due to justifiable excuse and that there was a substantial question presented which would make his appeal meritorious. The suggestion now made for the first time on page 16, Paragraph 7 of the Petition for Writ of Certiorari that the petitioner did not comply with the foregoing Rules because he did not anticipate that the United States Court of Appeals for the Second Circuit would enforce the said Rules is both without merit and without substance. Clearly, such a suggestion does not constitute a cause beyond the control of the petitioner.

4. The failure of the petitioner to comply with the requirements of Rule 73, Title 28 U.S.C., and Rule 14 of the Rules of the Court of Appeals for the Second Circuit Title 28 U.S.C., does not constitute a case of general im-

portance requiring the United States Supreme Court to invoke its jurisdiction to review the matter. The dismissal of the petitioner's appeal turned upon the special facts and particular circumstances under which the United States Court of Appeals for the Second Circuit determined that the petitioner did not demonstrate that his failure to comply with the foregoing rules was due to causes beyond his control or that his appeal presented a substantial question. This suit was based on alleged negligence in the operation of a motor vehicle. After hearing and observing some nine witnesses and examining some fifteen exhibits, the United States District Court, Eastern District of New York, which tried the suit without jury, found that the plaintiff's own negligence played a substantial part in causing the accident and directed the entry of judgment in favor of the defendant. The findings and judgment of the United States District Court, Eastern District of New York are based upon the particular facts and circumstances pertaining to the specific accident between the parties and do not constitute a matter of general significance. Similarly, the failure of the petitioner to comply with Rule 73, Title 28 U.S.C., and Rule 14 of the United States Court of Appeals for the Second Circuit, does not constitute a matter of general significance. The excuse offered that after judgment was entered against the petitioner by the United States District Court, the petitioner proceeded to vacation in Puerto Rico does not establish that the delay was due to causes beyond his control nor does it constitute a matter of general importance. The fact that the petitioner personally had been a lawyer who specialized in the trial of personal injury actions for a number of years does not constitute an excuse for his failure to comply with the foregoing rules, nor does it establish that such failure was due to causes beyond his control, nor does it constitute a matter of general significance. The fact that the petitioner and his

experienced trial attorney did not retain an additional attorney to collaborate in his appeal until some 2 months after judgment had been entered against the petitioner, does not excuse his failure to comply with the foregoing Rules, nor does it constitute a cause beyond his control, nor does it constitute a matter of general importance.

From the foregoing, it is respectfully submitted that the petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review this matter and it is respectfully prayed that the Petition for Writ of Certiorari be denied.

POINT II

The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused the discretion conferred upon it by Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Section 2071, Title 28 U.S.C. in dismissing the petitioner's appeal for failure to file the record and docket his appeal as required by both Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, 28 U.S.C.

1. The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused its discretion in determining that the petitioner's trip to Puerto Rico and his delay in retaining an additional attorney to collaborate on his appeal some two months after judgment was entered against him did not constitute causes beyond his control and hence did not establish justifiable excuse for the petitioner's failure to comply with the foregoing Rules. That the petitioner was personally in Puerto Rico and did not order the minutes of the trial from the court reporter until March 17, 1967, does not constitute a justifiable excuse for failure to comply with Rule 73 of the Federal Rules of Civil Procedure,

Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C. It would seem that it cannot be well contended that because a litigant decides to vacation in the islands that would operate to suspend the Rules of the Federal Rules of Procedure and the Rules of the United States Court of Appeals for the Second Circuit. This is particularly true where the petitioner himself had been an attorney specializing in trial work and where the communications between Puerto Rico and New York City are excellent.

Moreover, that an additional attorney was retained to collaborate with the attorney of record on February 21, 1967, was not beyond the control of the petitioner. Not only was the petitioner himself a member of the bar specializing in accident cases for a number of years, but the attorney of record who tried the case was an experienced attorney. The fact that a third attorney was retained to collaborate some two months after judgment was entered, is no sound reason for tolling the operations of the Federal Rules of Civil Procedure and the Rules of the Court of Appeals for the Second Circuit. Otherwise, the said Rules could be circumvented merely by retaining additional counsel. In addition, there has been no justifiable excuse advanced for the failure of the petitioner personally and his attorney of record who tried the case to comply with the aforesaid rules during the two months prior to the retaining of additional counsel.

Thus it was, that both the moving papers and the oral argument on behalf of the petitioner failed to establish that his failure to comply with both the Federal Rules of Civil Procedure and the Rules of the Court of Appeals for the Second Circuit was "due to causes beyond the control of the moving party."

2. The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused its discretion in determining that cross-examina-

tion of the petitioner on a collateral matter did not constitute any substantial ground that would make his appeal meritorious. The sole ground upon which the petitioner endeavored to rest his claim that there was a substantial ground that would make his appeal meritorious was the allegation that the Trial Court erred in permitting the cross-examination of the petitioner in respect to the latters criminal convictions. That contention overlooks the terms of Section 4513 of the New York Civil Practice Law and Rules which expressly provide that the conviction of a crime may be shown for the purpose of affecting the weight of a witness' testimony and that the witness "shall be required to answer any relevant question" as to the conviction. Moreover, the party cross-examining is not concluded by the witness' answer.

> "Section 4513. Competency of person convicted of crime.
>
> A person who has been convicted of a crime is a competent witness; but the conviction may be proved; for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer."

This has long been the law in this jurisdiction and the above quoted section of the law is the same as the former Section 350 of the Civil Practice Act with a few minor language changes. This was recognized by the Appellate Division-First Department of the Supreme Court of the State of New York in *Cooke* v. *Glassheim*, 207 A. D. 592, 202 N.Y.S. 599. In that case, the Court held:

> "By Section 350 of the Civil Practice Act it is provided that: 'A person who has been convicted of a crime is, notwithstanding, a competent witness * * *; but the conviction may be proved, for the purpose of affecting weight of his testimony, either by the rec-

ord, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question.' The criticism of the defendant's attorney was, therefore, unjustified, as he was clearly acting within his rights."

At common law, a person convicted of a crime was disqualified from testifying and when the said disqualification was removed by statute, it was provided that such a person was made competent to testify but with the limitation that his conviction of a crime might be proved for the purpose of affecting the weight of his testimony.

It has been expressly held by the New York Court of Appeals in the case of *Moore* v. *Leventhal,* 303 N. Y. 534, that the admission by a witness under cross-examination, that he has been convicted of a crime does not deprive the cross-examiner of the right to ask further relevant questions as to the conviction.

"We do not think an admission by a witness under cross-examination that he has been convicted of a crime serves to deprive the cross-examiner of the right to show the conviction. The scope of such inquiry, as defined by section 350 of the Civil Practice Act, is not so limited: 'A person who has been convicted of a crime is, notwithstanding, a competent witness in an action or special proceeding; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question.'"

The foregoing New York Rule and decisions apply with particular force where the petitioner's trial attorney brought out on direct examination that the petitioner had

been convicted of a crime and opened the door to cross-examination as to the nature of the crimes of which the petitioner was convicted. On cross-examination when the petitioner's testimony was vague and indefinite as to the convictions, certified copies of the convictions were placed in evidence.

Furthermore, it cannot be seriously denied that all questions as to the credibility of the witnesses were for the trier of the fact and that the determination of the Trial Court who personally observed the respective witnesses and examined the many exhibits should not be disturbed.

Therefore, it is respectfully submitted that the petitioner failed to establish any substantial ground that would make his appeal meritorious.

CONCLUSION

It is respectfully submitted that the petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review this matter and the petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit has abused its discretion in dismissing the petitioner's appeal and it is respectfully prayed that the petition for writ of certiorari be denied.

Respectfully submitted,

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